

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND  
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.418/Bang/2022
Assessment Year : 2017-18

M/s. Think and Learn Private Limited, 4/1, 6 <sup>th</sup> Floor, Tower D, IBC Knowledge Park, Bannerghatta Main Road, Opposite Fire Station, Bengaluru – 560 029. <b>PAN : AAECT 0931 A</b>	Vs.	Principal Commissioner of Income Tax - 3, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. T. Suryanarayana, Advocate
Revenue by	:	Shri. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	24.08.2022
Date of Pronouncement	:	30.08.2022

**ORDER**

*Per N. V. Vasudevan, Vice President:*

This is an appeal by the assessee against the order dated 31.03.2022 of the Principal CIT – 3 (PCIT), passed under section 263 of the Income Tax Act, 1962 (hereinafter called ‘the Act’) in relation to Assessment Year 2017-18.

2. The assessee is a company engaged in the business of providing online learning platform in the name of “BYJU” for kindergarten to 12<sup>th</sup> standard students and other related services. The assessee filed return of income for Assessment Year 2017-18 declaring total income of

Rs.62,18,53,627/- . The AO passed an Order of Assessment U/S.143(3) of the Act, dated 24.10.2019 making the following additions to the total income of the assessee:

1. *Disallowance u/s 14A of Rs.3,26,95,348/-*

*(b) Addition of share premium u/s 56(2)(vii)(b) of Rs.1,24,43,868/-*

*(c) Capitalisation of expenses of Rs.2,97,03,171/-*

*(d) Disallowance of commission paid to non-resident u/s 40(a)(i) of Rs.30,48,95,804/-*

*(e) Disallowance of pact made to Facebook, Ireland Limited u/s 40(a)(i) of Rs.3,18,65,271/-*

3. It may be seen from the above additions made that a sum of Rs.30,48,95,804/- being commission paid to non-resident was disallowed under section 40(a)(i) of the Act. The breakup of sum of Rs.30,48,95,804/- is as follows:

1.	<i>More Ideas General Trading LLC, UAE</i>	<i>27,64,91,272</i>
2.	<i>CSC Middle East Ltd.</i>	<i>1,87,31,370</i>
3.	<i>Kensho Knowledge Solutions WLL</i>	<i>55,71,352</i>
4.	<i>Strategic Publicity &amp; Advertising Co. WLL.</i>	<i>41,01,810</i>
	<i>Total</i>	<i>30,48,95,804/-</i>

4. The assessee filed an application before the Authority for Advance Ruling (AAR) (Income Tax, Mumbai) on 29.08.2019 in which it sought a ruling on the payment of Rs.27,64,91,272/- made to M/s. More Ideas

General Trading Company LLC, UAE (More Ideas). The application of the assessee was for Assessment Years 2016-17 and 2017-18. The application of the assessee for ruling was dismissed by the AAR for the reason that as per the provisions of section 245R(2)(i) of the Act, the application will not be entertained, if the question raised in the application is already pending for consideration before any income tax authorities. The AAR found that the issue for Assessment Year 2017-18 was already pending before the AO pursuant to the return of income filed by the assessee and queries raised by the AO on the aforesaid payment in the context of disallowance u/s.40(a)(i) of the Act for non-deduction of tax at source. Therefore, AAR refused to entertain the application of the assessee seeking a ruling that the said sum is not chargeable to tax and therefore there was no obligation on the part of the assessee to deduct tax at source. The AAR passed the order on 28.01.2020.

5. It is not in dispute that the assessee did bring to the notice of the AO that assessee has preferred an application before the AAR on the question of disallowance under section 40(a)(i) of the Act in respect of payments made to More Ideas, UAE. Following was stated by the assessee in a letter dated 06.12.2019 filed before the AO.

6. The AO however passed the order dated 24.12.2019 wherein he made additions which have already been set out in the earlier part of this order. The additions so made also includes payment made to More Ideas, UAE for non deduction of tax at source and by invoking the provisions of Sec.40(a)(i) of the Act. We may also make it clear that the application before the AAR was only in relation to payments made to More Ideas,

UAE, and none of the other additions made by the AO was subject matter of application before the AAR.

7. The PCIT, in exercise of his powers under section 263 of the Act, was of the view that the action of the AO in passing the order dated 24.12.2019 under section 143(3) of the Act for Assessment Year 2017-18 was erroneous and prejudicial to the interest of the Revenue because as per the provisions of section 245R(a)(i) of the Act, the AO shall not consider the application where the question raised in the application is already pending before any income tax authorities. Since the AO failed to make enquiry with regard to pendency of application before AAR on the question of TDS under section 40(a)(i) of the Act in respect of payments made to More Ideas, UAE, the order was erroneous and prejudicial to the interest of the Revenue and liable to be set aside to the file of the AO to pass fresh Order of Assessment after taking into account the order of the AAR dated 28.01.2020.

8. In reply to the aforesaid show cause issued by the AO, assessee filed letter dated 31.03.2022 submitting as follows:

- The Assessee is not in agreement with the order of the Learned AO and hence has filed an appeal before the Hon'ble Commissioner of Income tax (Appeals) ("CIT(A)") which is pending adjudication.
- In parallel, the Assessee had initially filed a writ petition before the Hon'ble High Court against the order passed by the AAR rejecting the application. Subsequently, the Assessee has withdrawn the writ filed in order to avoid multiple lines of litigation and to pursue the matter under normal appellate proceedings. Acknowledgement copy of the memo for

withdrawal filed before Hon'ble High Court was also filed before the PCIT.

- Considering that the disallowance has already been made by the Learned AO in the aforesaid order, the said order is not prejudicial to the interest of revenue and initiating proceedings under section 263 of the Act, would result in a double disallowance. Accordingly, the Assessee requested not continue proceedings under section 263 of the Act.

9. The PCIT however proceeded to pass the impugned order setting aside the order of the AO and directed the AO to pass a fresh order with the following observations:

*“7. Whereas taking into consideration the material available on record, I hold that the assessment order passed by the AO under section 143(3) of the Act dated 27.09.2019 is erroneous and prejudicial to the interest of the revenue within the meaning of section 263 of the Act as the AO has failed to verify the outcome of the order of the Hon'ble AAR and therefore as per section 245RR read with section 245S and clause (ix) to Explanation-1 of section 153 (as per which the extended time was available to complete the assessment) was required to complete the assessment only after such order is passed by the AAR. Accordingly, I hereby set aside the order under section 143(3) of the Act dated 24.12.2019 to the file of the AO with a direction to pass the order afresh in this regard after taking into account the order of the Hon'ble AAR dated 28.01.2020 and in accordance with the provisions of section 245R read with section 245S of the Act after affording sufficient opportunity of being heard to the assessee.”*

10. Aggrieved by the aforesaid order of the PCIT, the assessee has preferred the present appeal before the Tribunal. We have heard the submissions of the learned Counsel for the assessee who made 3 propositions viz.,

(a) That when the AO has made a disallowance on payments made to More Ideas, UAE and when the said disallowance is subject matter of appeal before CIT, the PCIT cannot exercise jurisdiction under section 263 of the Act and in this regard, learned Counsel placed reliance on the following decisions:

- i. CIT Vs. Vam Resorts and Hotels Pvt. Ltd., [2019] 111 taxmann.com 62 (Allahabad)
- ii. CIT Vs. Sampathmal Chordia, [2003] 127 Taxman 525 (Madras)
- iii. Smt. Renuka Philip Vs. ITO [2019] 409 ITR 567 (Madras)

(b) It was submitted by him that if the order passed by the AO contrary to the mandate laid down in section 245R(2)(i) of the Act, such an order would be a void order and the PCIT in exercise of his powers under section 263 of the Act cannot set aside such void order and give a fresh innings to the AO to pass a fresh Order of Assessment. In this regard, our attention was drawn to a decision of the ITAT, Pune Bench, in the case of Pioneer Distilleries Limited Vs. PCIT, ITA No.479/PUN/2017, order dated 10.06.2019.

(c) It was submitted that when the addition in respect of payments to More Ideas, UAE, has been made by the AO in the order passed u/s.143(3) of the Act, there was no prejudice to the Revenue and therefore the condition precedent for invoking the provision of section 263 of the Act was not satisfied.

11. The Learned DR submitted that the assessee has been taking contradictory stands and has not made known the fact that he had

approached the AAR in clear terms before the AO. It was his submission that in the light of express provisions under section 245R(2)(i) of the Act, the only conclusion that PCIT can arrive at is that the order passed by the AO was erroneous and prejudicial to the interest of the Revenue and therefore the PCIT was justified in invoking the provisions of section 263 of the Act.

12. In his rejoinder, learned Counsel for the assessee submitted that the CIT(A) in an appeal against the Order of Assessment under section 251(1)(a) of the Act can confirm, reduce, enhance or annul the assessment. Under section 263(1)(i) of the Act, the CIT(A) has power of cancelling an assessment and directing a fresh assessment besides enhancing or modifying the assessment and has no power to annul an order of assessment. An order annulling an assessment can be passed only when it is illegal and void, whereas an order cancelling an assessment can be passed when an order is otherwise valid and suffers from some curable defects. The PCIT u/s.263 of the Act cannot annul an order of assessment. If an order is void then that order can only be annulled and it cannot be cancelled and a fresh assessment cannot be directed to be made in exercise of powers under section 263 of the Act.

13. We have given a very careful consideration to the rival submissions. The first and the foremost aspect which we notice is that under the provisions of section 245R(2)(i) of the Act, it is only the question raised in an application before the AAR that cannot be decided by an income tax authority, when the question is pending for consideration before the AAR. Provisions are extracted for the purpose of better understanding:

*(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application: Provided that the Authority shall not allow the application where the question raised in the application,-*

*46[[**Provided** that the Authority shall not allow the application where the question raised in the application,-*

*(i) is already pending in the applicant' s case before any income- tax authority, the Appellate Tribunal or any court;*

14. Under the provisions of section 153 explanation 1, clause ix of the Act, the period commencing from the date on which the application is made before the AAR and ending with a date on which the AAR pronounces its ruling and such ruling is received by the PCIT or CIT shall not be counted for the purpose of computing limitation for the purpose of passing an Order of Assessment.

15. It is thus clear from a combined reading of the provisions of section 245R(2)(i) and the provisions of section 153 explanation 1 (ix) that the Order of Assessment will not become void as argued by the parties before us. To the extent that it relates to the payments made to More Ideas, UAE, the AO should not have decided the issue at all. For this reason, the entire Order of Assessment cannot be said to be void.

16. In so far as the payments made to More Ideas, UAE, is concerned, the AO has already disallowed the payment and added the same to the total income of the assessee and the assessee is in appeal before the CIT(A). In these circumstances, it cannot be said that the Order passed by the AO was

prejudicial to the interest of the Revenue. The fact that in the proceedings before the first appellate, the addition will be attacked on the ground that the addition has been made contrary to the provisions of section 245R(2)(i) of the Act and therefore void, cannot be the basis to say that the interest of the Revenue is prejudiced, at this stage. Without going into any of the other arguments raised by both the parties, we are of the view that twin conditions have to be satisfied for exercising of powers under section 263 of the Act viz., (i) the Order sought to be revised must be erroneous and (ii) prejudicial to the interest of the Revenue. Since the payments made to More Ideas, UAE has already been added by the AO in the order of Assessment, there is no prejudice to the interest of the Revenue. In the facts and circumstances of the present case, we are of the view that PCIT fell into an error in passing the impugned order. The impugned order is therefore liable to be quashed on this ground and is accordingly quashed.

17. In the result, appeal of the assessee is allowed.

*Pronounced in the open court on the date mentioned on the caption page.*

**Sd/-**  
**(CHANDRA POOJARI)**  
**Accountant Member**

**Sd/-**  
**(N. V. VASUDEVAN)**  
**Vice President**

Bangalore,  
Dated: 30.08.2022.  
/NS/\*

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT        | 4. CIT(A)     |
| 5. DR         | 6. Guard file |

By order

Assistant Registrar,  
ITAT, Bangalore.